IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 25, 2009

STATE OF TENNESSEE v. RICHARD PERKINSON

Appeal from the Criminal Court for McMinn County
No. 06-493 Amy A. Reedy, Judge

No. E2008-01180-CCA-MR3-CD - Filed March 26, 2009

The defendant, Richard Perkinson, appeals from his McMinn County Criminal Court jury convictions of aggravated burglary, *see* T.C.A. § 39-14-403 (2005), and vandalism of property valued at $1,000 or more but less than $10,000, *see id.* § 39-14-408. He claims that the trial court erred in denying his motion to suppress the victim's pretrial identification of the defendant, which was acquired by a photographic showup. He also challenges the sufficiency of the convicting evidence. Discerning no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, J., joined.

Richard Hughes and Chessia Cox, Assistant Public Defenders (on appeal); and James F. Logan, Jr., Cleveland, Tennessee (at trial), for the appellant, Richard Perkinson.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Robert Steven Bebb, District Attorney General; and Paul Donald Rush, Assistant District Attorney General, for the appellee, State of Tennessee

OPINION

In August 2006, a McMinn County grand jury indicted the defendant for aggravated burglary, alleging that on April 16, 2006, the defendant "unlawfully and knowingly or intentionally enter[ed] the habitation of [the victim,] Tim Harris[,] without his effective consent . . . with intent to commit a felony, theft or assault." The grand jury also indicted the defendant for vandalism, alleging that the defendant "cause[d] damage to or the destruction of personal property, to-wit: basement door, [$1,000] or more but less than [$10,000] in value, without [the] effective consent of the owner." A jury convicted the defendant of both counts as charged on November 9, 2006.

The trial court held a sentencing hearing on June 8, 2007, and sentenced the defendant to two concurrent four-year sentences as a standard offender with standard release eligibility. On

the same day, the trial court entered the judgments of conviction. The defendant filed a timely motion for new trial on July 6, 2007, which was denied by the trial court on November 5, 2007. On June 6, 2008, the defendant filed an untimely notice of appeal; however, this court permitted the late filing of the notice of appeal in *State v. Richard Perkinson*, No. E2008-01180-CCA-MR3-CD (Tenn. Crim. App., Knoxville, July 16, 2008) (order).

Before trial, the defendant filed a motion to suppress stating that the defendant "was subjected to a [showup] identification process which [was] per se suggestive under Tennessee law." He argued, "The indicia of reliability are not present and [the defendant] has been denied his rights to due process of law and to counsel." The State responded that, although it "[w]ish[ed] that this had not happened," the victim clearly identified the defendant independently of the photographic showup. In the hearing, the court heard the testimony of the victim and that of the investigating officer, Deputy Doug Mills. The testimony of those witnesses essentially tracked their trial testimony, which is detailed below. The trial court credited the victim's testimony and denied the motion to suppress. Upon denying the motion, the trial court held the trial on the same day.

The victim, Tim Harris, testified that, on April 16, 2006, he and his mother had recently moved into a newly-built home in a "great neighborhood" in the Riceville area of McMinn County; however, they were not completely finished unpacking. The victim testified that "around two or three o'clock" in the afternoon he was in his living room when he heard a "loud crash" from the downstairs basement, and he went downstairs to investigate, expecting that something had fallen. Upon turning on the lights, he saw a man that he later identified as the defendant standing "[i]n the middle of [his] basement." The man was approximately ten feet from the victim and faced him at a 45 degree angle. He stated that the man did not wear glasses and that he wore a "black, red and white" bandana or "do-rag." He said the "do-rag" looked "like a biker or something would [wear]." The man did not touch anything in the basement and was "[j]ust looking around." At trial, the victim testified that the defendant "looked at supplies . . . from the move." The victim said to the man, "Who the hell are you, where did you come from? What do you want?" The man then, according to the victim, "looked at [the victim], he didn't say a word, and walked past [the victim], just calmly walked . . . out the door that was just kicked in." The victim testified that the man had to walk toward him to exit, and at one point he was "right beside" the victim, approximately two feet away. The victim said, "[H]e was making a point to try to keep his . . . identity hidden, but I could see him." He explained that his basement was "framed up with very good fluorescent [strip] lighting" and that he could easily see throughout his entire basement.

As the man left the basement, the victim "was right behind him yelling at him." Although the victim wanted to stop the man, he testified that he chose not to because "[he] didn't know if he was carrying any weapon." The man then "calmly got in his truck" in the driveway and "started backing down the driveway." The victim described the truck as a green Dodge Ram 1500 with silver along the bottom and an extended cab. He stated that the windows of the truck were not tinted, and he could see the man as he drove the truck. As the truck pulled out of the driveway, it temporarily became stuck, giving the victim time to record the license plate number. The victim also noted that a black and brown, medium-sized dog sat in the bed of the truck along with some building materials.

The victim called 9-1-1 to report the incident and gave the license tag number to the operator. Later, Deputy Mills arrived at his house and took a statement from the victim. Deputy Mills displayed a picture of the defendant to the victim by using the picture message capabilities of his mobile telephone. Deputy Mills asked if the man in the picture was the same person who broke into his house, and the victim affirmed that he was and that the man was the defendant. The victim testified that he had no doubt the defendant was the man in his basement. Deputy Mills also presented the victim with pictures of the defendant's truck and dog, which he identified.

The victim stated that he also recognized the defendant from seeing him in court on different occasions, even when he was not accompanied by his lawyer. The State asked, "Do you know whether you recognized him from the picture or from seeing him in your basement?" and he replied, "More so from seeing him in person." The victim testified that he saw the defendant in general sessions court for the preliminary hearing and that the defendant stayed in the back of the courtroom without his lawyer. He explained that, the day of the preliminary hearing, he saw the defendant in the morning, and when he returned in the afternoon, he wore glasses and had changed shirts; however, the victim said he still "[e]asily" recognized the defendant as the man in his house.

The victim stated that he did not give the defendant or anyone else permission to break into his basement. He testified that, as a result of the burglary, the french doors in his basement became warped and would not properly lock. He testified that replacing the doors would cost approximately $1,200.

On cross-examination, he clarified that he did not see the defendant when he was arraigned and that he did not hear the defendant's name called before the court or the defendant's response to the charged offenses. He could not recall the man in his basement having any distinguishing marks on his face. He said, "No. I mean I don't, I was in shock, I was devastated, I didn't expect him to be there." Defense counsel also questioned the victim regarding his description of the Dodge truck as "two-tone."

Deputy Mills testified that he received a call regarding a burglary and that when he arrived at the scene, he observed that someone had broken into the basement. He observed a dent on the outside of the basement door and that the door "was kind of buckled." He explained, "I took the initial report, I took photos of the scene, received a photo of the individual who owned the truck and the homeowner could identify him." The victim described the burglar to Deputy Mills as "a white male, short, stocky, wearing some type of blue jeans, a tee shirt and a black head bandana, 'do-rag,' . . . thing." The sheriff's department "ran the tag that came back to [the defendant]." Deputy Mills learned that the department had a picture of the owner of the green truck's tag number on file, and he arranged for the department to send him the photograph via his mobile phone's picture messaging capabilities. Deputy Mills testified that "[w]ithout hesitation" the victim identified the man from the picture as the one who burglarized his house.

Deputy Mills later showed pictures of the defendant's Dodge Ram pickup truck and his dog to the victim, who positively identified both photographs. He also showed the defendant pictures of a bandana found in the defendant's pocket during the booking process of his arrest. The victim identified the bandana as the same one worn by the burglar. When the defendant was

arrested, his truck had a "dealer's tag" that differed from that reported by the victim. However, Deputy Mills also compared the vehicle identification number (VIN) listed on the registration of the license tag and found that it "perfect[ly] match[ed]" the VIN number found on the green truck the defendant owned. He noted, however, that although the victim reported "home improvement stuff" in the bed of the truck, when he arrested the defendant, the truck bed was empty. After giving the defendant his *Miranda* warnings, he asked the defendant "why there was stuff in the back, . . . some stuff from Lowe's [hardware store] and he had dropped it off."

Deputy Mills stated that detectives from the department went to the residence listed on the vehicle registration and found that the defendant no longer lived there. A resident of the former address informed the detectives of the defendant's new address at County Road 850. Upon arriving at the County Road 850 address, law enforcement officers verified that the defendant lived at the residence; however, because the defendant was not home, they waited for him to arrive. He stated that law enforcement officers arrived at the defendant's residence at approximately 8:30 p.m. Deputy Mills testified that the defendant was taken to the department at "roughly" 9:05 p.m. and that he signed a waiver of his *Miranda* rights at 9:11 p.m. He noted that the defendant did not give any written statements to the detectives.

On cross-examination, Deputy Mills agreed that "[the victim] knew at the time [he] showed him the photograph that [he] had gotten this individual's photograph from the license tag number . . . [he] had followed the tag number [the victim] had given [him], gotten a name, had them . . . send . . . the photograph and . . . showed it to [the victim]." Deputy Mills also maintained that he showed the photograph to the victim twice on April 16, 2006, although the victim stated he only saw the photograph later that evening. When asked whether "there was [any] immediateness to this situation" in conducting the photo showup, he responded, "We were looking for the vehicle, we had issued a [be on the lookout] on it . . . for the Athens area."

Deputy Mills also testified that he did not observe any footprints or scuff marks on the door. He stated that, at the time of the defendant's arrest, the dog was not in the bed of the Dodge truck, but the dog was at the residence. He did not lift any fingerprints from the basement, and he did not take any tire marks from the victim's residence for comparison.

The defendant called Ricky Lankford, his neighbor, who testified that on April 16, 2006, Easter Sunday, he returned from church around 1:00 p.m. He could see the defendant's yard from his window, and he observed the defendant "out there scattering hay and picking up limbs and rocks and stuff like that" with his girlfriend. Mr. Lankford left his home at approximately 5:00 or 5:30 p.m., and he testified that the defendant continued to work in his yard at that time. He said, "When I c[a]me home that evening the law had pulled up over at my next door neighbor's." Mr. Lankford also noticed the defendant's truck at the residence, and he "guess[ed]" that he had dealer tags on the truck for "a couple of weeks." On cross-examination, Mr. Lankford stated that the defendant was wearing jeans and "some kind of colored shirt, short sleeved." He stated that he could not recall whether the defendant wore anything on his head.

Henry Petri testified that he had known the defendant for five years. He testified that the defendant "[was] an acquaintance" who occasionally stopped by his home to see him. He said,

"I asked him what was with the dealer tag on his truck the last time I saw him." He testified that he saw the dealer tags "maybe a week, two weeks" before the defendant's arrest. On cross-examination, Mr. Petri explained that he met the defendant through work, and the defendant would carry his tools in the bed of his truck. He further testified that he never saw the defendant wear a "do-rag" or bandana.

Loraine Watson, the defendant's girlfriend, stated that on April 16, 2006, she stayed at the defendant's residence. Her former husband watched her two younger children that weekend, and she arrived at the defendant's home around 6:00 p.m. on Friday, April 14, 2006. She testified that on Saturday, April 15, the couple "went riding" around the Hiwassee River. Ms. Watson testified that on Sunday they "had the great pleasure of throwing grass seed and hay all over [the defendant's] yard." She stated that they began work at 10:00 or 11:00 a.m. and worked all day. She had to leave at 6:00 p.m. to babysit her granddaughter. She had no doubt that the defendant did not leave his residence at County Road 850 between the morning and 6:00 p.m. Ms. Watson testified that she "was surprised" to learn the defendant had been arrested and that she "couldn't understand it." She bailed him out of jail the evening of April 16.

Ms. Watson estimated that the distance from the defendant's home to the subdivision where the victim lived was "16 to 20 miles at least." She testified that the defendant's truck had dealer tags for two or three weeks prior to April 16, 2006, because his regular tags had been stolen.

On cross-examination, Ms. Watson stated that she had been dating the defendant for four years and that she stayed with him at his residence every other weekend. She stated that they liked to ride motorcycles, and he occasionally wore a "cap" when riding the motorcycle. When confronted with a photograph of the "do-rag" recovered from the defendant, she stated it looked "similar" to what he wore. She stated that the defendant's dog, Proto, was a blue heeler with "a lot of gray in him." She acknowledged that she had seen the defendant keep tools in the bed of his truck.

She testified that the defendant wore blue jeans and a tee shirt on April 16, 2006. They ate lunch around 1:00 or 2:00 p.m., but she could not recall what they ate; however, she testified that they did not leave the residence to eat. Ms. Watson testified that the defendant was disabled and not working at the time because he hurt his ankle while working construction. She stated that, over the course of the day, she was separated from the defendant for no more than 10 or 15 minutes.

The defendant testified that on April 16, 2006, he and Ms. Watson were "trying to get all the red mud" in his yard "covered with grass." He testified that after his girlfriend left, he went to a McDonald's in Etowah for dinner. He stated that he "was almost to [his] house when blue lights came on." He said, "It was a felony stop, they had a gun on me, made me get in the gravel and all that. . . . They asked me if I had been to Riceville and I said no."

The defendant testified that he did not have tools in the bed of his pickup truck on April 16 and that his dog had been "grounded" from riding in the truck bed "because two weeks earlier he had left a pretty good mess in it." He stated that, at some point before April 16, he noticed

that somebody stole the tags from his truck. He explained, "I have a friend that runs Bradley Motors and he lets me use a dealer tag in case he needs me to take a car anywhere or if I need it for anything." He did not report the missing tags at first "because [his] other tag was expired in May and [he was] getting new model tags anyway." The defendant stated that his truck was not "two-toned." He said, "I see green trucks all the time and most of them have the silver bottom to them, but m[ine] does not."

Although the defendant worked in construction, he did not participate in the construction of the victim's home. He also testified that he did not "kick in" the victim's door. He said, "I don't think I could do any damage to a steel door, I have like a 30 pound limit on my right ankle for . . . extra weight."

On cross-examination, he testified that, although he could not remember exactly when he left for Etowah, he went "[s]hortly" after his girlfriend left at 6:00 p.m. He could not remember when he was arrested, but he recalled that the sky was "dusky dark." He also explained that, during his preliminary hearing, he changed shirts because he spilled mustard on his first shirt, and he put on glasses because he needed them for reading that afternoon.

Based on the evidence as summarized above, the jury convicted the defendant of aggravated burglary and vandalism. The defendant appeals his convictions on two grounds. First, he argues that the trial court erred by denying his motion to suppress the "impermissibly suggestive" pretrial photographic identification. Second, the defendant argues "the evidence was insufficient to convict [him] of any of the offenses charged . . . based on the impermissibly suggestive identification or, in the alternative, the evidence was insufficient to convict [the defendant] of aggravated burglary."

Identification of the Defendant

On appeal, the defendant "submits that his rights under [the] Due Process Clause of the Fourteen Amendment of the United States Constitution were violated as a result of the trial court failing to grant his motion to suppress" because "'the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971 (1968); *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972 (1967); *State v. Strickland*, 885 S.W.2d 85, 88 (Tenn. Crim. App. 1993)). The defendant argues that the photographic "showup" is "inherently suggestive" according to *State v. Thomas*, 780 S.W.2d 379, 381 (Tenn. Crim. App. 1989). The State disagrees, stating that "[t]he showup identification was warranted under the circumstances because it occurred as part of an on-the-scene investigation shortly after the crimes occurred" and that the identification "was reliable under the totality of the circumstances."

We note that, at the conclusion of the suppression hearing, the trial court made detailed findings that addressed the pertinent legal criteria. Our review, at this stage, is quite narrow. Unless the evidence preponderates otherwise, we defer to the trial court's findings of fact on suppression issues. *See State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). The trial judge is entrusted to decide questions of witness credibility and to resolve conflicts in the evidence. *State v. Walton*,

41 S.W.3d 75, 81 (Tenn. 2001). In conducting our review, the "[t]estimony presented at trial may be considered . . . in deciding the propriety of the trial court's ruling on a motion to suppress." *State v. Perry*, 13 S.W.3d 724, 737 (Tenn. Crim. App. 1999); *see also State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998). Our review of the trial court's application of law to the facts, however, is conducted under a de novo standard of review. *See Walton*, 41 S.W.3d at 81.

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons*, 390 U.S. at 384, 88 S. Ct. at 971. In *Simmons*, the Court observed that "improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals." *Id.* at 383, 88 S. Ct. at 971. Noting that "[e]ven if the police subsequently follow the most correct photographic identification procedures . . . , there is some danger that the witness may make an incorrect identification," the Court concluded that the danger of misidentification "will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if . . . the photograph of a single such individual recurs or is in some way emphasized." *Id.* The Court also observed that "[t]he chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." *Id.*

Following *Simmons*, the Court in *Neil v. Biggers*, 409 U.S. 188, 198-99, 93 S. Ct. 375, 381-82 (1972), established a two-part analysis to assess the validity of a pre-trial identification. First, the trial court must determine whether the identification procedure was unduly suggestive. *Id.* at 198, 93 S. Ct. at 381-82. Next, if the trial court determines that the identification was unduly suggestive, it must then consider whether, under the totality of the circumstances, the identification procedure was nonetheless reliable. *Id.* at 198-99, 93 S. Ct. at 382. The Court then identified five factors for assessing the reliability, and therefore the admissibility, of an identification. They are: (1) the opportunity of the witness to view the perpetrator at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the time between the crime and the identification. *Id.* at 200, 93 S. Ct. at 382. These factors for evaluating the reliability of an identification have been adopted in this state. *See Rippy v. State*, 550 S.W.2d 636, 640 (Tenn. 1977); *Bennett v. State*, 530 S.W.2d 511, 515 (Tenn. 1975).

Law enforcement officers make routine use of various identification procedures. With physical and pictorial lineups, a victim is asked to examine the likeness of multiple individuals and to indicate whether the perpetrator is among those individuals presented. These are the preferred methods of identification. *See State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998). With a showup, the police arrange an observation of the defendant by the victim. *State v. Dixon*, 656 S.W.2d 49, 51 (Tenn. Crim. App. 1983); *see Cribbs*, 967 S.W.2d at 794 (describing a showup as presenting to the victim either the suspect or a single photograph of the suspect). The showup method of identification is regarded as inherently suggestive. *Thomas*, 780 S.W.2d at 381. As such, its use to identify a person suspected of committing an offense is disfavored "unless (a) there are imperative circumstances which necessitate a showup, or (b) the showup occurs as an on-the-scene investigatory procedure shortly after the commission of the crime." *Id.* (footnotes omitted).

We agree with the defendant that the procedure used in this case is a "showup," thus, was inherently suggestive. *See id.* However, the trial court recognized that "[t]he law is very clear . . . that a one person showup with photograph presented is unduly suggestive." The trial court then recited the five *Biggers* factors on the record and individually discussed why the identification was sufficiently reliable. The trial court found that the victim had "unusually great opportunity to view the defendant" and that his "degree of attention was also great." The trial court determined that the defendant's description was highly accurate and noted that many of the discrepancies in the testimony were "semantic issues." It stated, "His level of certainty and the length of time, I'm sure that time stood still for him." Under our standard of review, we credit the trial court's factual findings and will not disturb its denial of the defendant's motion to suppress.

First, Deputy Mills testified that he presented the single photograph to the defendant while initially investigating the scene of the burglary. Deputy Mills reported to the scene within 10 or 15 minutes of receiving the call about the reported burglary. He stated that he communicated with the sheriff's department regarding the vehicle tag numbers, which resulted in his obtaining the defendant's picture during his first visit to the scene. We agree with the State that the photographic showup occurred "as part of an on-the-scene investigation shortly after the crimes occurred." As the trial court noted, the victim had an unusually good opportunity to observe the defendant. The evidence shows that the defendant looked the victim in the eye and came within two feet of the victim. The basement had bright fluorescent lights, and the victim attentively watched the defendant as he walked from the basement to his pickup truck, which had untinted windows. The victim accurately described the defendant, his "do-rag," his pickup truck, and his dog. Testimony from the victim and Deputy Mills suggested a high degree of certainty that the photograph depicted the burglar. Further, as discussed above, the presentation of the photograph occurred within a short time after the victim observed his assailant. We hold that the trial court acted within its discretion in denying the defendant's motion to suppress and in admitting evidence of the victim's pretrial and subsequent identifications of the defendant.

Sufficiency of the Evidence

The defendant argues "the evidence . . . was legally insufficient to convict him of any of the offenses charged . . . based on the impermissibly suggestive identification or, in the alternative, the evidence was insufficient to convict [the defendant] of aggravated burglary." The defendant has miscast the first argument in this issue as an evidence sufficiency claim. Whether the evidence at trial is legally sufficient to support the verdict is examined in light of the evidence actually presented to the jury. *See State v. Longstreet*, 619 S.W.2d 97, 100-01 (Tenn. 1981), *overruled in part on other grounds by State v. Leveye*, 796 S.W.2d 948, 953 (Tenn. 1990). Evidence that a defendant maintains was improperly admitted does not implicate the State's failure or success in proving its case. The remedy for the erroneous admission of prejudicially harmful evidence, therefore, is reversal for trial error, not dismissal of the charge. *See Longstreet*, 619 S.W.2d at 100-01; *State v. William Binkley*, No. M2001-00404-CCA-R3-CD, slip op. at 4-5 (Tenn. Crim. App., Nashville, Apr. 5, 2002).

However, despite the suppression issue, "the [defendant] would still submit that there was not enough evidence to convict him of aggravated burglary." A convicted criminal defendant

who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict because a guilty verdict destroys the presumption of innocence and replaces it with a presumption of guilt. *See State v. Evans*, 108 S.W.3d 231, 237 (Tenn. 2003); *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). This court must reject a defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. *See Carruthers*, 35 S.W.3d at 558; *Hall*, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. *See State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). Issues of the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court will not re-weigh or re-evaluate the evidence. *See Evans*, 108 S.W.3d at 236; *Bland*, 958 S.W.2d at 659. This court may not substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. *See Evans*, 108 S.W.3d at 236-37; *Carruthers*, 35 S.W.3d at 557.

A person commits aggravated burglary when he enters a habitation with the intent to commit a felony, theft, or assault. T.C.A. §§ 39-14-402, -403. A "habitation" is "any structure, including buildings, . . . which is designed or adapted for the overnight accommodation of persons." *Id.* § 39-14-401(1)(A). The defendant only challenges the element of the crime requiring "intent to commit a felony, theft, or assault."

The defendant, through his brief, admits that he vandalized the doors of the home and entered the victim's basement. Although the defendant testified in his own defense at trial, he offered no explanation as to why he was in the home. A jury may infer criminal intent from the circumstances of the case. *See State v. Holland*, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993). "In the absence of an 'acceptable excuse,' a jury may reasonably and legitimately infer that by breaking and entering a building containing valuable property, a defendant intends to commit theft." *State v. Ingram*, 986 S.W.2d 598, 600 (Tenn. Crim. App. 1998). The evidence adduced at trial[1] established that the defendant broke into the basement of a newly-constructed home in a "great neighborhood" that contained various belongings and "supplies . . . from the move." We find the jury was presented with sufficient evidence to support the defendant's conviction for burglary.

Conclusion

[1]For the purposes of evaluating the sufficiency of the convicting evidence, we only consider testimony presented to the jury, and we do not consider evidence presented at the suppression hearing.

Because the trial court acted within its discretion in denying the defendant's motion to suppress and because a reasonable jury could conclude that the defendant committed the charged offenses, we affirm the judgments of the trial court.

_____

JAMES CURWOOD WITT, JR., JUDGE